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BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Order Instituting Investigation on the Commission's Own Motion into the Operations and Practices of Pacific Gas and Electric Company's Natural Gas Transmission Pipeline System in Locations with Higher Population Density.	I.11-11-009 (Filed November 10, 2011)

PACIFIC GAS AND ELECTRIC COMPANY'S APPEAL OF THE PRESIDING OFFICER'S DECISION

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I. INTRODUCTION

PG&E does not dispute its responsibility to maintain complete, up-to-date class locations for its gas transmission system. However, the findings and conclusions of the Presiding Officer's Decision in Proceeding I.11-11-009 ("Class Location POD") are not supported by the record evidence and do not comport with applicable legal standards.[1] The vast majority of violations found in the Class Location POD are the result of double-, triple-, quadruple-, and even quintuple-counting individual segments to yield multiple violations per segment and then layering different alleged code violations upon each segment for the same underlying conduct. This compounding approach is inappropriate and grossly inflates the overall number of violations. In addition, many of the violations found in the Class Location POD are premised on the misapplication of California law and regulations, and violate PG&E's fundamental constitutional right of Due Process under the United States and California Constitutions.[2]

The Commission should reject the legally defective findings in the Class Location POD and issue a decision grounded in a proper application of the record and the law.

II. VIOLATIONS FOUND IN THE CLASS LOCATION POD ARE BASED ON MULTIPLE LEGAL ERRORS THAT UNDERMINE THE DECISION.

A. The Class Location POD Errs in Quantifying the Alleged Violations.

By inappropriately finding violations by segment, and by finding multiple violations arising from the same underlying conduct, the Class Location POD concludes that deficiencies in PG&E's class location procedures resulted in an astounding 18,038,359 violations of law. PG&E's failure to maintain complete, up-to-date class locations was, as described by CPSD,[3] a process "breakdown." That is the heart of the matter, and it is that "breakdown" that constitutes the alleged violation – not a meaningless tally of affected segments, and certainly not an artificial "layering" of violations or maximizing the count of "violation days." The Class Location POD's

[1] PG&E is simultaneously appealing the size and structure of the penalty associated with these findings in its appeal of the Presiding Officers' Decision on Fines and Remedies to Be Imposed on Pacific Gas and Electric Company for Specific Violations in Connection with the Operation and Practices of Its Natural Gas Transmission System Pipelines ("Penalties POD"), issued on September 2, 2014. PG&E incorporates by reference as if fully set forth herein the arguments regarding PG&E's constitutional right to due process, adequate notice and protection from excessive fines as well as the arguments relating to the application in these proceedings of Commission Rule of Practice and Procedure Rule 1.1 set forth in PG&E's appeal of the Penalties POD.

[2] U.S. Const., amend. XIV, §1; Cal. Const., art. I, § 7.

[3] CPSD has been renamed SED, the Safety and Enforcement Division. PG&E uses CPSD here for clarity.

findings purport to quantify alleged violations by totaling the number of pipeline segments with an incorrect class location. The Commission should reject this substantial and artificial increase in the number of alleged violations.

1. "Segments" are an inappropriate measure of violations because the number of segments in PG&E's system is constantly in flux.

The number of pipeline segments is an artificial and inappropriate measure of violations. PG&E uses the term "pipeline segment" to identify a continuous length of pipe with similar characteristics (pipe specifications, class location, etc.). Due to the dynamic nature of PG&E's natural gas transmission system, the total number of segments is constantly in flux.[4] The number and identity of pipeline segments regularly fluctuate during normal operations; pipeline replacements, maintenance activities, and the installation of new components and equipment all potentially impact the total number of segments.[5] In addition, during PG&E's class location review and its separate MAOP validation effort, the total number of pipeline segments fluctuated as PG&E identified adjacent sections of pipeline with different characteristics.[6]

Because segment numbers along PG&E's pipelines regularly change, "segments," as reported to the Commission, represent no more than a snapshot of PG&E's system at a point in time. Segments that exist one day may not exist the next, and segments reported to the Commission during the course of this OII may have been created only recently. As such, the Class Location POD's use of segments to identify violations is inappropriate.

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[4] *See* Ex. PG&E-1 at 1-1(PG&E/Yura) ("Although CPSD [now SED] alleges code violations based on individual pipe segments, as we described in our April 2, 2012 Response, the number and identity of pipeline segments is not fixed.").

[5] *See* Ex. CPSD-1 at 5 n.8 (CPSD recognized the on-going impact of "changes to the system" on the number of contiguous segments, when it referenced the need for "semi-sequential numbering" to "accommodate changes made to the segment numbering due to changes to the system from maintenance activities or when new components are installed.").

[6] *See* Ex. PG&E-1 at 1-1 n.2 (PG&E/Yura). For example, if PG&E determined that 500 feet of pipeline in the middle of a Class 2 segment should be classified as Class 3, that one Class 2 segment would be split into three new segments: a Class 2 segment, the 500-foot Class 3 segment, and a second Class 2 segment. Conversely, if PG&E determined that a Class 2 segment located between two Class 3 segments should be classified as a Class 3, and all three segments had the same pipeline specifications, those three segments would merge and become one Class 3 segment.

2. PG&E's use of "segments" does not define the term for purposes of assessing potential violations and penalties.

The Class Location POD finds that "PG&E has defined this term for purposes of classification and reporting. . . . Since PG&E identified these segments, it cannot now argue that there is no violation simply because previously identified segments have changed or no longer exist."[7] This reasoning is inappropriate and greatly inflates the total number of alleged violations. As described in the record, PG&E used segmentation for internal record keeping purposes – it does not follow that PG&E's definition of segment should be used to assess or count individual violations, and the Class Location POD cites no support for its decision to use PG&E's internal definition for enforcement purposes. Each pipeline contains potentially hundreds of individual segments, many of which are only a few feet in length, and many of which regularly change. The construction of a single building or one well-defined area not identified by patrols can affect the class location of multiple segments, as can a single error in applying the "cluster rule" or in analyzing a class location. The end result of the Class Location POD's approach is the double-, triple-, quadruple-, and even quintuple-counting of individual segments affected by a single class location change. The Commission should reject the Class Location POD's approach of quantifying violations by segment and issue a decision appropriate for the factual record.

3. The Class Location POD's layering of violations is inappropriate.

The Class Location POD not only erroneously categorizes violations by pipeline segment but, compounding the error, then layers multiple violations on the same individual pipeline segments to penalize the same underlying conduct. This methodology results in the same, often very short segments, segments being counted and recounted, generating an exaggerated number of alleged violations. For example, the Class Location POD counts many segments that were erroneously in a lower class as a violation of not only 49 C.F.R. § 192.13(a) (not following procedures), but also 49 C.F.R. § 192.613 (continuing surveillance), 192.609 (class location study), and 192.611 (MAOP confirmation/revision).

This compounding approach is inappropriate. The deficiencies on an identified segment stem from a single underlying error: the class location for that particular stretch of pipeline was

[7] Class Location POD at 22.

incorrect. More broadly, all of these deficiencies stem from a single issue, i.e., that PG&E's patrol, class location, and continuing surveillance processes were not as effective as they should have been.

4. The Class Location POD erroneously disregards Commission precedent.

Contrary to the factual record and sound public policy, the Class Location POD implies that the number of violations is easily quantifiable. That conclusion ignores Commission precedent.

When presented with alleged violations that are not discrete or easily quantified, the Commission has focused on categories of actions or omissions. In *The Utility Consumers' Action Network ("UCAN") v. SBC Communications ("AT&T")*, D.08-08-017, 2008 Cal. PUC LEXIS 302, UCAN alleged that AT&T was committing numerous continuing violations of regulations requiring telecommunications carriers to provide access to 911 emergency services from certain California residential units. AT&T's alleged violations flowed from its "official warm line policy" and continued for a period of over nine years.[8] Rather than attempt to analyze each act or omission individually, each with a specific tenure and each potentially violating multiple regulations, the Commission approached AT&T's ongoing policy or practice as a single course of conduct.[9] "While we have determined that AT&T has violated two subsections of section 2883, the company pursued essentially one course of conduct: a failure to comply with the warm line policies enacted by the legislature."[10]

Here, the Class Location POD purports to find a similarly large and complex set of alleged violations stemming from a single course of conduct: the implementation of PG&E's patrol, class location, and continuing surveillance processes. Rather than accept the Class Location POD's findings, the Commission should, as it did in *UCAN v. AT&T* (D.08-08-017) and D.99-06-080, group potential violations by category and focus upon the single core issue:

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[8] D.08-08-017, 2008 Cal. PUC LEXIS 302, at *40.

[9] D.08-08-017, 2008 Cal. PUC LEXIS 302, at *40.

[10] D.08-08-017, 2008 Cal. PUC LEXIS 302, at *40, *50-51; *see also Application of Pac. Gas & Elec. Co.*, D.99-06-080, 1999 Cal. PUC LEXIS 430, at *127-28 (faced with a record that did not permit the Commission to quantify the extent or duration of individual acts, the Commission grouped thousands of continuous violations into three broad categories).

PG&E's patrol, class location, and continuing surveillance processes were not completely effective.

The Class Location POD substantiates its dismissal of *UCAN v. AT&T* by finding that "our decision to [categorize violations rather than count them individually in *UCAN*] occurred at the time we considered the appropriate penalties to be imposed for the violations. This decision does not address the penalties to be imposed. That determination . . . will be made in a separate decision."[11] However, the Penalties POD similarly fails to appropriately consider *UCAN v. AT&T*.[12] Relying on their own procedural decision to bifurcate consideration of individual violations from an appropriate penalty, both the Class Location POD and the Penalties POD ignore this precedent. By doing so, both PODs artificially elevate the severity of the offense by double, triple, quadruple, and even quintuple-counting segments and violations per segment. The Commission should reject the Class Location POD and find an appropriate penalty considering PG&E's class location deficiencies for what they are, a large, complex, and unquantifiable set of violations more appropriately considered by category of failing, than by a litany of unquantifiable violations.

5. The Class Location POD seriously miscounts the violations it finds.

Even taken at face value, the Class Location POD miscounts the violations it finds, much to the detriment of PG&E.[13] The Class Location POD finds 3,643 violations.[14] However, a close reading of Appendix B to the POD shows that number is incorrect. A tally of each violation in Appendix B totals 2,360 violations, not 3,643. The Class Location POD's approach led to 1,283 violations being incorrectly imputed to PG&E, an inappropriate inflation of 54%.[15]

B. The Class Location POD Commits Legal Error in Characterizing the Alleged Violations as Continuing.

The Class Location POD also dramatically inflates the total number of violations by improperly characterizing one-time events as "continuing" violations, supporting the imposition

[11] *See* Class Location POD at 20-21.

[12] *See* Penalties POD at 41-45.

[13] *See* Class Location POD at 21 ("Our findings of the number of violations here will reflect the severity of the offense, one of the factors we will consider when determining the appropriate penalty.").

[14] *See* Class Location POD at 2, Appendix B at 1.

[15] The violations implicated by the incorrect quantification of violations include all violations listed in the Class Location POD Table of Violations and Offenses.

of cumulative penalties under Public Utilities Code § 2108. The Class Location POD finds that the alleged violations should be deemed "continuing," notwithstanding that it admittedly cannot determine an actual start date from the record, and concludes that the violations continue until they are cured, even in the absence of continuing misconduct.[16]

These findings were based in large part on the assumption that a specific act that was a violation on the day it occurred remains a "continuing violation" every day it is not corrected or its effects linger. That assumption is flatly inconsistent with the statutory language – which refers not to "un-remediated" violations, but to "continuing" ones – and governing case law, and should be rejected.

Section 2108 provides: "Every violation of . . . [a] rule . . . of the commission . . . is a separate and distinct offense, and in case of a continuing violation each day's continuance thereof shall be a separate and distinct offense." By its terms, this language provides that a violation will generally be considered a "separate and distinct" event – ***unless*** the party continues to engage in the same conduct, in which case, a new violation will be recognized for each day during which that conduct continues. As its language makes clear, § 2108 applies only to violations that ***continue*** over time, not to the subsequent consequences of finite events that themselves constitute a violation.[17] Courts in other contexts have also defined continuing violations as courses of unlawful conduct that continue over a period of time.[18]

The Class Location POD's boundless theory that ongoing consequences cause an otherwise finite act to continue indefinitely violates California Supreme Court precedent. The California Supreme Court has "[u]niformly . . . looked with disfavor on ever-mounting penalties and [has] narrowly construed the statutes which either require or permit them."[19] *People ex rel.*

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[16] Class Location POD at 41-44.

[17] *Investigation of Qwest Commc'ns Corp.*, D.03-01-087, 2003 Cal. PUC LEXIS 67, at *20-21 ("The Commission has calculated fines on the basis of Section 2108 in cases where the evidence established that . . . practices that violated statutory or decisional standards had occurred over a period of time, rather than specific instances of violations."); *cf. People v. W. Air Lines, Inc.*, 42 Cal. 2d 621 (1954) (upholding daily penalties under § 2107 during time period where the airline continued to sell tickets at unreasonable prices not approved by the Commission).

[18] *See, e.g.*, *Garcia v. Brockway*, 526 F.3d 456, 462 (9th Cir. 2008) (*en banc*) ("[A] continuing violation is occasioned by continual unlawful acts, not by continual ill effects from an original violation." (quoting *Ward v. Caulk*, 650 F.2d 1144, 1147 (9th Cir. 1981)); Ward, 650 F.2d at 1147; *Richards v. CH2M Hill, Inc.*, 26 Cal. 4th 798, 823 (2001); *Birchstein v. New United Motor Mfg., Inc.*, 92 Cal. App. 4th 994, 1006 (2001).

[19] *Hale v. Morgan*, 22 Cal. 3d 388, 401 (1978); *accord Walnut Creek Manor v. Fair Emp't & Hous. Comm'n*, 54 Cal. 3d 245, 271 (1991). Statutes permitting penalties for continuing violations are

Younger v. Superior Court, 16 Cal. 3d 30 (1976), is particularly instructive. In that case, the Court construed Water Code § 13350(a), which at the time imposed a penalty of $6,000 "for each day in which [an unlawful oil] deposit occurs." The Court found this language to be ambiguous regarding the two competing interpretations urged by the parties: the penalty is imposed for (1) each day the oil remained in the water; or (2) each day the process of deposit lasted.[20] The Court adopted the latter, narrower construction because the alternative – each day the oil remained on the water – was illogical and unduly punitive.[21] Unlike the statute in *Younger*, § 2108 is not ambiguous. However, even if a strained reading of the statute could allow for a "continuing violation" to be found based on the mere failure to right a wrong, under *Younger*, the Commission must reject that interpretation in favor of the narrower construction in which a violation is deemed "continuing" – and cumulative penalties authorized – only when the misconduct at issue was actually ongoing.[22] The Commission should reject the Class Location POD's improper characterization of one-time events as "continuing" violations, and reject the imposition of cumulative penalties under § 2108.[23]

C. The Class Location POD Improperly Applies the Spoliation Doctrine.

The Class Location POD also relies on a misapplication of the spoliation doctrine, resulting in findings of violations without evidence of misconduct. Spoliation is "the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation."[24] The Class Location POD completely fails to analyze the "reasonably foreseeable litigation" element, and applies the spoliation doctrine wholesale. This application of the spoliation doctrine is plainly improper. The duty to preserve documents arises only when a party "reasonably should know that evidence

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anomalies. Civil penalty provisions are generally "limited either to a fixed multiple of actual damages, to a specified total amount per 'violation' or to a fixed duration." *Hale*, 22 Cal. 3d at 401.

[20] Younger, 16 Cal. 3d at 43.

[21] *Younger*, 16 Cal. 3d at 44 (interpreting statute to impose a penalty "for each day in which oil ***is deposited*** in the waters of the state and not for each day during which such oil ***remains*** in the waters") (emphasis added).

[22] *Younger*, 16 Cal. 3d at 44; *see also Doran v. Embassy Suites Hotel*, No. C-02-1961 EDL, 2002 U.S. Dist. LEXIS 16116, at *16 (N.D. Cal. Aug. 20, 2002) ("Even where the Legislature provides for daily damages . . . California courts have 'looked with disfavor on ever-mounting penalties and have narrowly construed the statutes which either require or permit them.'") (quoting *Hale*, 22 Cal. 3d at 383-84).

[23] The violations implicated by the incorrect interpretation of § 2108 include all violations listed in the Class Location POD Table of Violations and Offenses.

[24] *See Reeves v. MV Transp., Inc.*, 186 Cal. App. 4th 666, 681 (2010).

may be relevant to anticipated litigation."[25] The question of whether litigation is reasonably foreseeable is determined based on an objective standard which requires an evaluation of whether a reasonable party in the same factual circumstances would have reasonably foreseen litigation.[26] "This standard does not trigger the duty to preserve documents from the ***mere existence of a potential claim or the distant possibility of litigation***."[27] Rather, identification of a specific potential claim is a signal that litigation is reasonably foreseeable.[28]

The Class Location POD's application of the spoliation doctrine contravenes both jurisprudence and common sense, and the implications are breathtaking in scope. Litigation is among the potential consequences of ***any*** failure of infrastructure or engineering – whether building or bridge, road or rail, plane or pipeline – regardless of the era of original construction or the recordkeeping requirements then in existence. The threat of adverse inferences as articulated in the Class Location POD would subject every party to an indefinite duty to preserve documents before any litigation had been anticipated or commenced, without an opportunity to ascertain what documents are relevant to the litigation and thus what documents must be preserved. This application also would allow for a finding that a party improperly "destroyed" materials when the party had no improper intent and did not know the documents were lost and, indeed, even when the documents never existed in the first instance. This approach is, again, contrary to governing law – which requires evidence of "willful suppression"[29] – and it resulted here in a legally impermissible and untenable spoliation finding that must be rejected.[30]

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[25] *Bel Air Mart v. Arnold Cleaners, Inc.*, No. 2:10-cv-02392-MCE-EFB, 2014 U.S. Dist. LEXIS 23867, at *13 (E.D. Cal. Feb. 21, 2014); *see also Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998).

[26] *Micron Tech., Inc. v. Rambus, Inc.*, 645 F.3d 1311, 1320 (Fed Cir. 2011); *Apple Inc. v. Samsung Elecs. Co.*, 881 F. Supp. 2d 1132, 1145 (N.D. Cal. 2012) (phrase "reasonably foreseeable" sets an objective standard for a party's duty to preserve).

[27] *Micron*, 645 F.3d at 1320 (emphasis added) (citing *Trask-Morton v. Motel 6 Operating L.P.*, 534 F.3d 672, 681-82 (7th Cir. 2008)); *see also PersonalWeb Techs., LLC v. Google Inc.*, C13-01317-EJD (HRL), 2014 WL 580290, at *3 (N.D. Cal. Feb. 13, 2014) (litigation was not reasonably foreseeable until patents were acquired as it was the condition precedent for initiating litigation).

[28] *Bel Air Mart*, 2014 U.S. Dist. LEXIS 23867, at *14; *Apple Inc. v. Samsung Elecs. Co.*, 888 F. Supp. 2d 976, 991 (N.D. Cal. 2012) (trial courts in Ninth Circuit generally agree that duty to preserve triggered when potential claim is identified).

[29] *New Albertsons, Inc. v. Super. Ct.*, 168 Cal. App. 4th 1403, 1434 (2008); *see also In re Moore's Estate*, 180 Cal. 570, 585 (1919).

[30] *See United States v. Kitsap Physicians Serv.*, 314 F.3d 995, 1001 (9th Cir. 2002) (spoliation occurs if party had some notice that the documents were potentially relevant to the litigation before they were destroyed); *Akiona v. United States*, 938 F.2d 158 (9th Cir. 1991) (spoliation often requires notice that the documents are relevant to the litigation); *see also id.* at 161 (finding district court improperly shifted

The Class Location POD identifies 133 instances in which PG&E used assumed SMYS values greater than 24,000 psig. It finds that each of these is a violation of 49 C.F.R. § 192.107(b), amounting to 1,218,372 alleged violation days.[31] The POD cites no evidence showing that any one of the 133 uses of assumed SMYS greater than 24,000 psig – let alone all of them – was based on inadequate documentation.[32] In fact, the record contains no evidence that any one of the 133 segments involves pipe not manufactured in accordance with one of the listed specifications or whose specifications or tensile properties are unknown. Instead, the Class Location POD finds that given "the state of PG&E's current records . . . we believe that the doctrine of spoliation of evidence would apply" and therefore "infer[s] that every instance where there is an assumed SMYS value above 24,000 psi is a violation of 49 C.F.R. § 192.107" unless PG&E can rebut that inference.[33] These and other findings based on an incorrect application of the spoliation doctrine must be rejected, and the penalties on which the findings are based must be reassessed.[34]

D. The Class Location POD Improperly Finds Violations Based on Hindsight.

Additionally, the Class Location POD improperly bases a number of violations on facts that were not and could not have been known to PG&E at the time. It is well-settled, and indeed axiomatic, that a party generally cannot be found to have breached a legal obligation or violated a statutory or regulatory provision unless the circumstances surrounding the violation are known or at least knowable to the party at the time of the event. This is true even for so-called strict liability offenses: while the party need not intend for the violation to occur, the facts that render

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burden by using adverse inference because nothing in the record indicated government destroyed documents in response to the litigation, its destruction of the records does not suggest the records would have been threatening to the defense, and thus, the destruction of documents was not relevant). While courts in the Ninth Circuit have not applied an adverse inference unless the destruction was willful or grossly negligent, even simple negligence requires the party seeking the inference to prove relevance of the documents and prejudice suffered to justify the severe sanction. *E.g.*, *Reinsdorf v. Skechers USA, Inc.*, 296 F.R.D. 604, 627-28; *see Zubulake v. UBS Warburg*, *LLC*, 220 F.R.D. 212, 220 (S.D.N.Y. 2003).

[31] Class Location POD, Appendix B at 1.

[32] As part of their criticism of PG&E's use of assumed SMYS values greater than 24,000 psig, CCSF and CPSD address PG&E's recordkeeping practices. *See* CCSF Opening Brief at 7-8; CPSD Opening Brief at 14-15. Aside from the fact that this is the subject of a separate OII, I.11-02-016, such generalized allegations do not supply sufficient proof to establish that any of PG&E's 133 uses of an assumed SMYS value was based on inappropriate records.

[33] Class Location POD at 35-36.

[34] The violations implicated by the incorrect application of the spoliation doctrine include the 133 violations of 49 C.F.R. § 192.107(b) (assumed SMYS values) and the 133 violations of Public Utilities Code § 451 (assumed SMYS values) alleged in the Class Location POD.

the conduct unlawful must at least be discernible to the party at the time.[35] Accordingly, only evidence of those facts of which a party was or could reasonably have been aware may properly be considered and relied upon in holding a party liable for an offense.

This core principle was not followed here. The Class Location POD deems PG&E's conduct in violation of applicable rules and standards despite the fact that PG&E did not know and could not have known of the facts that rendered the conduct allegedly unlawful. For example, the Class Location POD holds that PG&E violated 49 C.F.R. § 192.107 in each instance that it assigned a "yield strength" higher than that appropriate for a pipe of "unknown" specification.[36] However, PG&E did not discern and could not have discerned that a lower yield strength was warranted because the pipeline was in fact not classified as "unknown" at the time.[37] These and other findings premised on facts known or assumed now, but unknown at the time of the alleged misconduct, cannot support the adjudication of violations. Those violations and the penalties based upon them must therefore be reassessed.[38]

E. The Class Location POD Errs by Adopting Violations That Were Alleged After the Close of Evidence.

1. Due process requires adequate and effective notice of the charged conduct.

Among the "basic" requirements of due process are notice of the charges and a reasonable opportunity to respond.[39] These "basic ingredient[s]" of fair procedure are essential safeguards of the "fundamental principle of justice" that no party may be "prejudiced in [its] rights without an opportunity to make [its] defense."[40] A severe violation of these basic

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[35] *See, e.g.*, *Lambert v. California*, 355 U.S. 255 (1957).

[36] Class Location POD at 30-36.

[37] Class Location POD at 26-28.

[38] The violations implicated by the incorrect reliance on hindsight include (among others) the 133 violations of 49 C.F.R. § 192.107(b) (assumed SMYS values), the 133 violations of Public Utilities Code § 451 (assumed SMYS values), the 224 violations of 49 C.F.R. § 192.609 (class location study), the 224 violations of 49 C.F.R. § 192.611 (MAOP confirmation/revision), the 677 violations of 49 C.F.R. § 192.613 (continuing surveillance), the 63 violations of 49 C.F.R. § 192.619 (non-commensurate SMYS), and the 63 violations of Public Utilities Code § 451(non-commensurate SMYS) alleged in the Class Location POD.

[39] *Salkin v. Cal. Dental Ass'n*, 176 Cal. App. 3d 1118, 1121 (1986) (quoting *Hackethal v. Cal. Med. Ass'n*, 138 Cal. App. 3d 435, 442 (1982)).

[40] *Pinsker v. Pac. Coast Soc'y of Orthodontists*, 12 Cal. 3d 541, 555 (1974); *see also Salkin*, 176 Cal. App. 3d at 1122 ("The individual must have the opportunity to present a defense.") (citing *Pinsker*, 12 Cal. 3d at 555).

guarantees occurs where, as occurred here, new charges are introduced after the accused has already made its defense.[41]

California courts have condemned the late assertion of new charges in administrative enforcement proceedings. In *Rosenblit v. Superior Court*, 231 Cal. App. 3d 1434 (1991), for example, the court of appeal decried disciplinary proceedings in which the accused "was kept in the dark about the specific charges made against him" as being "a charade" and "offen[sive]" to "even an elementary sense of fairness."[42] In *Smith v. State Board of Pharmacy*, 37 Cal. App. 4th 229 (1995), the court denounced the board's mid-hearing change of legal theories as violative of "the basic . . . elements" of due process.[43] Also, in *Cannon v. Commission on Judicial Qualifications*, 14 Cal. 3d 678 (1975), the California Supreme Court held that a charge not "contained in the formal notice" of proceedings had to "be stricken as irrelevant."[44] In so holding, the Court relied on *In re Ruffalo*, 390 U.S. 544 (1968) where adding a new charge midway through a disbarment proceeding was found unconstitutional due to the "absence of fair notice as to . . . the precise nature of the charges."[45]

The basic constitutional principle derived from these cases is that due process requires that an accused receive notice of the charge and an opportunity to defend against it, i.e., what the charge is and that it is being asserted, not merely notice of facts that may or may not later be the basis for charging a violation of law that requires a defense.

2. The Class Location POD impermissibly finds previously unalleged violations after the close of evidence.

On May 25, 2012, CPSD issued its report containing its factual findings from its investigation of PG&E's class location operations and practices and setting forth the violations of law it alleged against PG&E.[46] Table 12 and attachments 11 to 16 of the report, which list the alleged violations and calculate the number of days in violation for each, served as the primary

[41] *See Salkin*, 176 Cal. App. 3d at 1122.
[42] *Rosenblit*, 231 Cal. App. 3d at 1447-48.
[43] *Smith*, 37 Cal. App. 4th at 242.
[44] *Cannon*, 14 Cal. 3d at 695-696.
[45] *Ruffalo*, 390 U.S. at 551-52 & n.4 (1968); *see also Rosenblit*, 231 Cal. App. 3d at 1446 ("It is impossible to speculate how [the respondent] might have defended had he been informed of the specific problems with each patient.").
[46] Ex. CSPD-1.

charging document in this enforcement proceeding.[47] Those documents alleged 3,062 violations of law for total of 15,888,990 days in violation.[48] To calculate the days in violation, CPSD identified violation start dates using available information in PG&E's records and data responses and assumed all violations ended on June 30, 2011.[49] PG&E responded to CPSD's charges with written testimony and prepared its defense based on the violations CPSD asserted in the May 25, 2012 report.

After the close of evidence, the Class Location POD found that CPSD's end date for its alleged class location violations was not reasonable and instead used January 17, 2012 as the end date to calculate days in violation, unilaterally adding approximately 200 days to each continuing violation. This finding violates PG&E's Due Process rights and is entirely inappropriate. PG&E had no notice of, or opportunity to respond to, the Class Location POD's new violation end date. The Commission should reject these belatedly-added violations to which PG&E had no notice or opportunity to respond.[50]

F. The Class Location POD's Application of Section 451 Is Erroneous.

1. Section 451 is not, and cannot constitutionally be, a safety regulation.

The Class Location POD relies on § 451 as a basis for alleging 196 violations totaling 1,711,904 violation days.[51] That section, however, is a ratemaking provision and cannot serve as a free-floating source of pipeline safety requirements and penalties, as the Class Location POD erroneously concludes. The Class Location POD commits legal error in its application of § 451 and thus any penalty based on these purported violations is invalid.

a. Section 451 is a ratemaking provision.

Section 451 cannot reasonably be interpreted as imposing a general safety obligation on public utilities or authorizing penalties for violation of safety standards that are not specified in any statute, regulation, or Commission order. That section appears in Chapter 3, Article 1 of the

[47] *See* Ex. CSPD -1 at 58, Attachments 11-16.
[48] *See* Ex. CSPD -1 at 58, Attachments 11-16.
[49] *See* Ex. CSPD -1 at 58, Attachments 11-16; Class Location POD at 42.
[50] The violations implicated by allegations made after the close of evidence include all violations listed in the Class Location POD Table of Violations and Offenses.
[51] Class Location POD, Appendix B at 1.

Public Utilities Code, entitled "Rates," and is specifically titled "Just and reasonable charges, service, and rules." It reads as follows:

> All charges demanded or received by any public utility, or by any two or more public utilities, for any product or commodity furnished or to be furnished or any service rendered or to be rendered shall be just and reasonable. Every unjust or unreasonable charge demanded or received for such product or commodity or service is unlawful.
>
> Every public utility shall furnish and maintain such adequate, efficient, just and reasonable service, instrumentalities, equipment, and facilities, including telephone facilities, as defined in Section 54.1 of the Civil Code, as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public.
>
> All rules made by a public utility affecting or pertaining to its charges or service to the public shall be just and reasonable.

The placement of § 451 within the "Rates" article of the Public Utilities Code, the title of the provision, and the language and structure of the section itself require that it be interpreted as a ratemaking provision.[52] The first paragraph of § 451 mandates that a utility charge just and reasonable ***rates***; the second paragraph specifies what level of service a utility must furnish in exchange for receiving just and reasonable ***rates***; and the last paragraph specifies that any rules affecting ***rates*** must similarly be just and reasonable. To be sure, the provision states that a utility must maintain its services to promote "safety," but this requirement is explicitly tied to consideration of the rates that the utility may properly charge.[53]

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[52] *See People v. Hull*, 1 Cal. 4th 266, 272 (1991) ("[I]t is well established that chapter and section headings of an act may properly be considered in determining legislative intent . . . and are entitled to considerable weight.'") (internal citations and punctuation omitted).

[53] The Class Location POD concludes that because § 451 appears in Chapter 3 of the Act, titled "Rights and Obligations of Public Utilities," it is "entirely consistent" with the statutory scheme to interpret it as a free-standing utility safety obligation. Class Location POD at 38. The Class Location POD's analysis, however, rests on a critical error. In focusing on the heading of Chapter 3, the Class Location POD ignores the more specific heading in Article 1 ("Rates"). It is a cardinal principle of interpretation that a specific provision prevails over a more general provision. *E.g.*, *S.F. Taxpayers Ass'n v. Bd. of Supervisors*, 2 Cal. 4th 571, 577 (1992). Thus, the relevant heading is the more specific one, Article 1 ("Rates"). Given the "considerable weight" to which statutory headings are entitled under California law, it would be anomalous to interpret §451 as anything other than a ratemaking provision, especially where all of the other substantive provisions of Article 1 address ratemaking. On this point, it is notable that Chapter 4 ("Regulation of Public Utilities"), Section 3 ("Equipment, Practices, and Facilities") addresses utility "practices" and includes § 768, which concerns the Commission's regulation of safety issues.

This reading is affirmed by extensive precedent. It has long been settled that § 451, by its terms, requires a balancing of several considerations. Most basically, § 451 requires a balancing of rates against the proper level of service.[54] As the Commission has long maintained, in determining the proper level of service, it must evaluate and balance what is adequate, efficient, just, and reasonable.[55] Public safety is one important consideration in achieving this balance – as are the health, comfort, and convenience of the public and others. In setting just and reasonable rates, the Commission has broad latitude to adopt the safety standards that are consistent with the rates. Section 451 is, in other words, a ratemaking provision that allows the Commission to consider the relative "safety" of a utility's services and record in deciding the rates it may charge.

b. Section 451 cannot be interpreted to impose a stand-alone and absolute safety obligation.

PG&E is fully committed to safety, and with the substantial enhancements the company continues to make every day, PG&E's natural gas pipeline system will be safer than any state or federal regulation has ever required. However, reading §451 to create a stand-alone, free-floating safety obligation, as the Class Location POD does, is incompatible with the statutory text. That interpretation divorces one consideration (safety) from all the factors § 451 requires be evaluated and balanced in setting just and reasonable rates. Not only does it ignore the four factors the Commission must balance when determining the level of service to require in exchange for reasonable rates ("adequate, efficient, just and reasonable"), it also ignores that the statute requires only that the quality of "service, instrumentalities, equipment, and facilities" approved by the Commission must "***promote*** ... safety," not achieve it perfectly. In fact, had PG&E requested the rates needed to pursue safety at all costs, the Commission might have

[54] *See Pac. Tel. & Tel. Co. v. Pub. Utils. Comm'n*, 34 Cal. 2d 822, 826 (1950) (defining the Commission's primary purpose as "insur[ing] the public adequate service at reasonable rates without discrimination"); *see also Application of Pac. Gas & Elec. Co.*, D.00-02-046, 2000 Cal. PUC LEXIS 239, at *46 ("Our charge is to ensure that PG&E provides adequate service at just and reasonable rates").

[55] *See Corona City Council v. S. Cal. Gas Co.*, D.92-08-038, 1992 Cal. PUC LEXIS 563, at *28 ("SoCalGas argues that PU Code § 451 requires a balancing of the four factors: adequate, just, reasonable and efficient. We agree with SoCalGas that to determine the proper level of utility service we must carefully balance all four factors.").

appropriately rejected the request as "gold-plating."[56] An "absolute duty" of safety cannot be reconciled with the statutory text.

The Class Location PODs' mistaken interpretation of § 451 as imposing an "absolute duty" of safety – such that a utility could be found in violation based on new safety rules adopted years later – would also impermissibly render superfluous entire provisions of the Public Utilities Code and every Commission regulation that requires any safety measure of any kind.[57] Public Utilities Code § 768, for instance, authorizes the Commission to prescribe that utilities implement specified safety measures:

> The commission may, after a hearing, require every public utility to construct, maintain, and operate its line, plant, system, equipment, apparatus, tracks, and premises in a manner so as to promote and safeguard the health and safety of its employees, passengers, customers, and the public. The commission may prescribe, among other things, the installation, use, maintenance, and operation of appropriate safety or other devices or appliances, including interlocking and other protective devices at grade crossings or junctions and block or other systems of signaling. The commission may establish uniform or other standards of construction and equipment, and require the performance of any other act which the health or safety of its employees, passengers, customers, or the public may demand.

This provision would be surplusage if § 451 already provided the Commission with authority to prescribe or enforce general "safety" standards for utilities. Indeed, when adopting safety standards in the past, the Commission has notably relied not on § 451 but on § 768.[58]

In response, the Class Location POD concludes that its interpretation of § 451 complements, rather than renders superfluous, specific safety standards.[59] But the Class Location POD provides no explanation how, if that interpretation of § 451 is correct, specific safety standards could be anything other than redundant. The Class Location PODs' erroneous

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[56] *See, e.g.*, D.00-02-046, 2000 Cal. PUC LEXIS 239, at *65 (explaining in a rate case that "Section 451 does not require that ratepayers pay for the best service possible from a technological standpoint. We do not intend to set revenues at a level to provide funding for what some parties have called 'gold-plated' service").

[57] *See Klein v. United States*, 50 Cal. 4th 68, 80 (2010) (describing the rule of statutory construction that "courts must strive to give meaning to every word in a statute and to avoid constructions that render words, phrases, or clauses superfluous.").

[58] *See, e.g.*, *Investigation into the Need of a Gen. Order Governing Design, Constr., Testing, Maint. & Operation of Gas Transmission Pipeline Sys.*, D.61269 at 2, 4 (Cal. P.U.C. Dec. 28, 1960) (adopting General Order 112).

[59] Class Location POD at 38-39.

interpretation of § 451 would completely swallow the need for specific safety regulations because it would allow the Commission to find a violation wherever it determines, after the fact, that a utility's conduct was anything other than the safest possible, thus rendering meaningless every other safety provision under California law, contrary to basic principles of statutory construction.

The Class Location POD's interpretation of § 451 is essentially an unlimited license for the Commission to second-guess any engineering decision or utility practice after the fact, and to impose crippling fines for any practice it determines in hindsight to have been lacking from a safety perspective. It would be extraordinary to conclude that the Legislature prescribed such an extreme standard by making a mere passing reference to safety in a ratemaking provision. The Legislature would have spoken with a great deal more clarity had it intended to impose on every public utility in the state an "absolute" statutory duty of safety, enforced by massive financial penalties (§§ 2107-2108), and distinct from the Commission's explicit safety rulemaking authority and the rules promulgated thereunder. As the U.S. Supreme Court explained in an analogous context, "Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in mouseholes."[60]

In sum, the Class Location POD misapplies § 451. The provision addresses safety only as one element among several that must be balanced as part of a § 451 inquiry aimed at determining just and reasonable rates and commensurate levels of service. To read § 451 as incorporating an independent source for enforcing every conceivable safety measure the Commission determines in hindsight should have been taken would defeat the objectives of the broader statutory scheme of the Public Utilities Code, and would raise further concerns under the Due Process Clauses of the United States and California Constitutions that can and should be avoided through a more limited interpretation.[61]

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[60] *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001).

[61] *E.g.*, *Ass'n for Retarded Citizens v. Dep't of Developmental Servs.*, 38 Cal. 3d 384, 394 (1985) (holding that "[w]hen faced with a statute reasonably susceptible of two or more interpretations, of which at least one raises constitutional questions, we should construe it in a manner that avoids any doubt about its validity") (citing *United States ex rel. Att'y Gen. v. Del. & Hudson Co.*, 213 U.S. 366, 407-08 (1909); *Carlos v. Super. Ct.*, 35 Cal. 3d 131, 147 (1983); *Cal. Hous. Fin. Agency v. Elliott*, 17 Cal. 3d 575, 594 (1976)).

c. Section 451 cannot be read to incorporate separate industry standards and regulations.

Even if § 451 could be construed as authorizing the imposition of penalties based on "safety" violations (which it cannot), it is in all events clear that the section cannot be interpreted – as the Class Location POD does – to implicitly incorporate separate industry standards and regulations. Such an interpretation is absolutely inconsistent with the language of the provision.

Section 451 states simply that a utility should maintain its "service, instrumentalities, equipment, and facilities" so as to promote "safety," among other interests. It includes no reference to other standards that are or may be adopted (as does, for instance, § 768), nor does it indicate or suggest that a violation of such a standard, even if related to "safety," could itself constitute a violation of § 451. To the contrary, the language of § 451 would appear to contemplate that the "safety" assessment should be conducted in a holistic and essentially binary fashion, with the utility's "service, instrumentalities, equipment, and facilities" deemed either safe or unsafe overall, without regard to the nature and number of individual issues or independent violations of separate safety standards that may bear upon that assessment. Certainly nothing in the provision can be read as expressly incorporating such standards, much less deeming each violation of them to also constitute an independent violation of § 451.

Interpreting § 451 to incorporate extrinsic safety standards would further exacerbate the due process concerns implicated by the Commission's overly broad (and essentially boundless) view of the authority conveyed by § 451, as it would potentially render utilities doubly liable for any violation of any rule or regulation, without any notice that such punishment might be imposed. This is especially and obviously true for industry standards that have not yet been adopted through statute or rule and, indeed, may never be adopted. By their nature, such standards are voluntary, and unless and until mandated by regulation noncompliance with them cannot be deemed a legal violation. Nothing in § 451 suggests or supports a contrary result.

In short, while § 451 cannot reasonably be interpreted to incorporate separate safety rules and regulations, it would be doubly inappropriate to construe it as incorporating voluntary industry standards and guidelines. Insofar as the Class Location POD finds that PG&E violated

such rules and standards,[62] those findings are not authorized by § 451 and cannot support the imposition of penalties.[63]

2. Any attempt to use Section 451 as a free-floating pipeline safety law violates due process/fair notice principles.

The Class Location POD's reliance on § 451 to find decades-old violations not otherwise proscribed by regulation or statute violates all notions of due process. Section 451 offered (and continues to offer) no meaningful guidance regarding the safety-related conduct required of utilities subject to the Commission's jurisdiction.

The Due Process Clauses of the United States and California Constitutions require that laws that regulate persons or entities must give fair notice of conduct that is forbidden or required.[64] "[A] penal statute [must] define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."[65]

Section 451 fails to meet this standard both on its face and specifically as applied in the Class Location POD. That section does not itself impose on regulated entities standards governing safety, and its language gives no indication that any such standards will be applied, or if so, which ones. It thus offers no instruction or direction by which a utility could reasonably determine the "conduct that is forbidden or required."[66] Instead, whether particular conduct will be deemed in conformity or contravention of the statute is left entirely to the discretion of the

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[62] *See, e.g.*, Class Location POD at 40-41.

[63] The violations implicated by the incorrect interpretation of § 451 include all those premised on that provision, including the 133 violations of Public Utilities Code § 451 (assumed SMYS values) and the 63 violations of Public Utilities Code § 451 (non-commensurate SMYS) alleged in the Class Location POD.

[64] U.S. Const. amend. XIV, § 1; Cal. Const., art. I, § 7; *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012).

[65] *Kolender v. Lawson*, 461 U. S. 352, 357 (1983); *see also, e.g.*, *Fox Television Stations*, 132 S. Ct. at 2317 (due process requires invalidation of statutes or rules that "fail[] to provide a person of ordinary intelligence fair notice of what is prohibited, or [are] so standardless that [they] authorize[ ] or encourage[] seriously discriminatory enforcement") (quoting *United States v. Williams*, 553 U.S. 285, 304 (2008)); *People v. Heitzman*, 9 Cal. 4th 189, 199 (1994); *People v. Mirmirani*, 30 Cal. 3d 375, 382 (1981) ("'[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.' Such also is the law of the State of California.") (internal citations omitted).

[66] *Fox Television Stations*, 132 S. Ct. at 2317.

adjudicating officials, in light of their own experience and views. This is precisely the type of statute that the courts have deemed impermissibly vague and therefore void.[67]

In sum, § 451 does not by its terms give notice of any safety standard, much less the regulatory scheme the Class Location POD attributes to it. The Class Location POD does not identify any specific or enforceable pipeline safety standard, rule, or practice submerged within § 451, and certainly none articulated anywhere prior to these proceedings. The Class Location POD's retroactive imposition of safety obligations through § 451 deprives PG&E of the constitutionally required fair notice of the standards to which it would subsequently be held.[68]

III. CONCLUSION.

Nothing in the factual record or in applicable law supports the Class Location POD's inflation of violations by counting and multiplying pipe segments, code sections, and days. Rather, the Commission should view any shortcomings in PG&E's class location and patrol processes as a single course of conduct, not as millions of days of individual violations. Moreover, the application of § 451 as a stand-alone safety provision is without statutory authority and runs afoul of the United States and California Constitutions. For the foregoing reasons, the Commission should reject the legally defective findings in the Class Location POD and issue a decision grounded on a proper application of the record and the law.

Respectfully submitted,

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[67] *See Fox Television Stations*, 132 S. Ct. at 2317; *see also, e.g.*, *Cline v. Frink Dairy Co.*, 274 U.S. 445 (1927) (statute precluding trusts other than those for purposes of seeking "reasonable" profits held unconstitutional).

[68] The violations implicated by the unconstitutional application of § 451 include all those premised on that provision, including the 133 violations of Public Utilities Code § 451 (assumed SMYS values) and the 63 violations of Public Utilities Code § 451 (non-commensurate SMYS) alleged in the Class Location POD.

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